STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 258926 Wayne Circuit Court
JEROME MCCRACKEN, Defendant-Appellant.	LC No. 04-004259-01

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his convictions assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 20 to 40 years' imprisonment for the assault with intent to murder conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court improperly admitted Crystal Dixon's testimony regarding DeJuan Love's statements to Dixon because admission of Love's statements violate defendant's Sixth Amendment right to confrontation, and Love's statements are barred by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We disagree. To the extent that the issue implicates the Confrontation Clause of the federal and state constitutions, the constitutional issue is reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. In *Crawford, supra* at 68, the United States Supreme Court held that, under the Confrontation Clause of the Sixth Amendment, "testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant." The *Crawford* Court did not precisely define what it considered "testimonial" evidence. *Id*. However, our Supreme Court has held that hearsay statements by a non-testifying codefendant bearing adequate indicia of reliability because uttered spontaneously without prompting to a friend or confederate were not "testimonial" and so not barred by *Crawford*. *People v DeShazo*, 469 Mich 1044; 679 NW2d 69

(2004). Therefore, we conclude that Love's statements to Dixon are not "testimonial" and are not barred by the Confrontation Clause. *Crawford, supra* at 36.

Defendant next argues that the trial court improperly admitted Love's statements to Dixon under MRE 803(b)(3). We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *Id*. at 670-671.

A statement against penal interest is "[a] statement which was at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." MRE 804(b)(3). The admission of a statement against interest as substantive evidence of guilt does not violate the Confrontation Clause contained in the Sixth Amendment if the prosecution can show that the declarant was unavailable as a witness and the declarant's statement bore adequate indicia of reliability or if the statement fell within a firmly rooted exception to the hearsay rule. *Washington, supra* at 671-672. Further, in determining whether the declarant's statement bears adequate indicia of reliability, the trial court should evaluate the circumstances surrounding the making of the statement as well as its content. *Id*. at 672, citing *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993).

In the present case, Love was expected to assert his Fifth Amendment right not to testify; consequently, he was not available as a witness. *Washington, supra* at 672. Further, Love's statement to Dixon, his former girlfriend, was voluntary. Love initiated the phone calls and informed Dixon that defendant shot James Ghee, the victim. Ghee's shooting occurred between 2:30 a.m. and 3:30 a.m. Love's statements to Dixon were made shortly thereafter at approximately 4:00 a.m. Moreover, the evidence revealed that Dixon and Love had a child together and that Love would be likely to speak the truth to Dixon. All of these factors weigh heavily in favor of finding adequate indicia of reliability. *Id.* at 672-673, citing *Poole, supra* at 165. Viewing the totality of the circumstances, and the foregoing factors, we conclude that Love's statements were sufficiently reliable to admit them as substantive evidence under MRE 804(b)(3). *DeShazo, supra*; *Washington, supra* at 672-673.

Defendant next argues that the prosecution failed to present sufficient evidence to support his conviction of assault with intent to murder, specifically noting that the prosecution failed to prove that defendant had the requisite intent to kill. We disagree. We review de novo the evidence in a bench trial in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Perkins*, 262 Mich App 267, 268; 686 NW2d 237 (2004).

The elements of assault with intent to murder are: (1) an assault, (2) with an actual intent to kill, (3) that if successful would render the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The actor's intent to kill may be proved by minimal circumstantial evidence. *Id*.; *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

In the present case, the evidence revealed that defendant was a passenger in a green car that passed Ghee's vehicle at the corner of Third Street and Hazelwood. Ghee testified that he

saw a person firing a handgun and that Ghee's car was struck at least ten times. After the green car collided with a pole and after Ghee intentionally drove his vehicle into the back of the green car, defendant exited the car and opened fire on Ghee's vehicle. The evidence revealed that defendant fired more than ten shots toward the driver's side where Ghee was sitting. Further, after Ghee exited his vehicle, defendant walked within a few feet of Ghee, pointed the handgun at Ghee's chest and face area and fired a "couple" of shots. Ghee was struck in the right leg, right forearm and left shoulder. Ghee testified that as he attempted to flee, defendant attempted to fire more shots but was unable to do so because the handgun was either "empty" or "jammed." Viewing the evidence in the light most favorable to the prosecution, we conclude it was sufficient to support defendant's conviction of assault with intent to murder.

Defendant next argues that the trial court improperly admitted Dixon's testimony regarding Love's conduct toward her at Love's preliminary examination. We disagree. Since defendant failed to object at trial to Dixon's testimony, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).

Dixon testified that Love made threatening gestures at her and that Love made her "nervous." Defendant contends that this evidence is inadmissible because it is irrelevant under MRE 401 or, alternatively, that the probative value of the evidence substantially outweighed by the danger of unfair prejudice under MRE 403. The credibility of a witness, however, is a material issue and evidence that supports the credibility of a witness is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod and remanded 450 Mich 1212 (1995). Dixon's testimony that Love made threatening gestures toward her at his preliminary examination was relevant to support her credibility as a witness. Dixon had previously testified that Love was threatening to "kill" her because of her relationship with defendant. The fact that Dixon continued to testify that Love ordered defendant to "kill" Ghee despite Love's gestures and intimidation at the preliminary examination tended to bolster Dixon's credibility. Additionally, the trial court, acting as the trier of fact in the present case, would not accord Dixon's testimony undue or preemptive weight. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Therefore, we conclude that defendant has failed to show plain error effecting his substantial rights regarding the admission of Dixon's testimony.

Defendant next argues that the trial court incorrectly scored OV 3 at ten points. We disagree. This court reviews a trial court's scoring of a sentencing guideline's variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). A scoring decision is not clearly erroneous if any evidence in the record supports it. *Id.*

MCL 777.33(1)(d) directs the trial court to assess ten points for OV 3 if bodily injury requiring medical treatment occurred to a victim. Here, Ghee testified that he received medical treatment at Henry Ford Hospital for three gunshot wounds and that surgery was performed on his right leg to remove a bullet. Thus, we conclude that the trial court's score of ten points for OV 3 was not clearly erroneous. *Hicks, supra* at 522.

Defendant next argues that the trial court incorrectly scored OV 13 at ten points. We disagree. Defendant did not raise this alleged scoring error at sentencing, in a proper motion for resentencing, or in a motion to remand filed in this Court. MCL 769.34(10). But, because defendant argues that the error resulted in a sentence outside the appropriate guidelines range, we

review the issue for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant must show that a clear or obvious error affected his substantial rights. *Id.*

OV 13 is scored at ten points if the "offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group." MCL 777.43(1)(d). Although an "organized criminal group" is not defined by statute, MCL 777.43(2)(b) provides:

> The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

Here, defendant contends that he was not part of an organized criminal group. Yet, the evidence showed that Love and Ghee had an ongoing feud over Ghee's relationship with Dixon and that Love threatened to "kill" Ghee prior to March 27, 2004. Additionally, the evidence revealed that defendant and three other people, including Love, located and followed Ghee on March 27, 2004, before firing more than twenty shots at him. Defendant did not act alone in his assault on Ghee and the evidence was sufficient to infer the existence of a criminal group. Accordingly, we conclude that defendant has failed to show clear error in the scoring of OV 13.

Defendant next argues that his sentence was disproportionate. However, if the trial court's sentence is within the appropriate guidelines range, this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Defendant does not argue the trial court relied on inaccurate information in scoring the guidelines. Further, defendant's minimum sentence of 20 years' imprisonment for assault with intent to murder is within the applicable scoring range provided by MCL 777.62. In light of our conclusion, *supra*, that the trial court did not err in scoring the guidelines, this Court must affirm defendant's sentence.

Defendant next argues that his guideline scoring was improper under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the trial judge increased the statutory sentencing guidelines range based on facts not proven beyond a reasonable doubt. Defendant's reliance on *Blakely* is misplaced. Our Supreme Court has held that Michigan's indeterminate sentencing system is unaffected by *Blakely*. *People v Claypool*, 470 Mich 715, 730 n 14 (Taylor, J.), 732 (Corrigan, C.J.), 741 (Cavanaugh, J.), 744 n 1 (Young, J.); 684 NW2d 278 (2004). Furthermore, this Court has established that *Claypool* is binding precedent. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005). Accordingly, defendant's argument is without merit.

Defendant finally argues that he was denied the effective assistance of counsel. Since defendant failed to move for a new trial or a hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error, and its conclusion about the constitutional question de novo. *Id*.

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to object to Dixon's testimony. Defense counsel is not ineffective for failing to object to admissible evidence. *Snider, supra* at 425. In light of our conclusion that Dixon's testimony was admissible, defense counsel was not ineffective for failing to object.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to raise an objection, based on *Blakely*, to the trial court's scoring of the statutory sentencing guidelines. Defense counsel is not ineffective for failing to make a meritless or futile objection. *Snider, supra* at 425. In light of our conclusion that an objection under *Blakely* would have been meritless, defense counsel was not ineffective for failing to object.

Finally, defendant argues that he was denied the effective assistance of counsel because defense counsel "coerced" defendant into waiving a jury trial; however, neither the trial transcript and nor the lower court record support his argument. The record reveals that defense counsel indicated to the trial court that he did not force defendant into waiving a jury trial. Further, the trial court determined on the record that defendant voluntarily waived his right to a trial by jury and validly signed the waiver of trial by jury form before trial. Therefore, the trial court's conclusions that defendant voluntarily waived his right to a trial by jury and that defendant validly waived trial by jury were not clear error. *LeBlanc, supra* at 579. Accordingly, defendant has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

We affirm.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello